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September 2, 1955

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CONCORD, N.H.

Mr. Richard T. Smith, Director  
Probation Department  
State Office Building  
Concord, New Hampshire

Dear Mr. Smith:

In reply to your inquiry of September 1, 1955 asking whether there is any statute which would legally prohibit the Superior Court, when making an order for the support of minor children, to include in such order an additional amount (perhaps 2%) which would go to the state Probation Department to help defray the cost of collecting and disbursing payments for support, you are advised as follows.

If we consider this as costs, it must be borne in mind that a distinction is drawn between costs of administration and of litigation. Costs of litigation are dealt with specifically in RSA 525 (R.L. c. 397) and it would appear from that statute that there is no statutory prohibition against such assessment, particularly in view of section 3 thereof which gives the Court a broad latitude.

However, it is elementary that a payment exacted from the individual as a contribution to the expenses of the government is a tax. I do not believe that the Court could validly impose a tax of 2% upon collections to support your department. The proposal does not enjoy the presumption of validity which accompanies a deliberate legislative enactment. "To establish the rules by which each individual's just and equal proportion of a tax shall be determined, is a task of much difficulty, and a very considerable latitude of discretion must be left to the legislature on the subject . . . And this discretion has always been exercised by the legislature. Within the limits of this discretion, as to the selection of proper subjects of taxation . . . the authority of the legislature is, without question, supreme." Opinion of the Justices, 97 N.H. 546, 547.

September 2, 1955

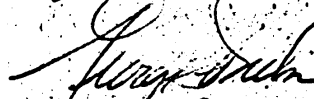
Mr. Richard T. Smith -- 2.

Statutory classification to be valid must reasonably promote some proper object of public welfare or interest. Opinion of the Justices, 85 N.H. 562. The activities of your department would appear to promote public welfare. However, the equal protection of the law is a pledge of the protection of equal laws. State v. Moore, 91 N.H. 16; Constitution of New Hampshire Bill of Rights. Therefore, I have considerable doubt as to the constitutionality of a tax upon the group paying alimony or support through your department as distinguished from those making such payments voluntarily direct to the spouse. State v. Penoyer, 65 N.H. 113; State v. Hirman, 65 N.H. 103. Also, there is the prohibition against taxing one citizen for the benefit of another, although it has less persuasive effect in view of the public interest in seeing that families are supported. But it is true that the support payments collected from the delinquent breadwinner are basically sums collected for the express benefit of his spouse and family and the benefit, if any, enjoyed by him is that of being relieved of the risk of confinement for non-compliance with or contempt of the orders of the court if he makes all reasonable efforts to make payments as decreed.

There are other corollary problems such as whether the tax proposed should be collected on sums ordered to be paid, but not paid because of the delinquent breadwinner's default thus enabling him to avoid a tax by his own default, if not assessed thereon.

It is my opinion that your proposal could not be validly instituted without legislative authority and that extreme care in the preparation of such legislation and the classification of those sought to be assessed would be required to bring such assessments within the perimeter of constitutional legislative power.

Very truly yours,



George F. Nelson  
Assistant Attorney General

GFN:L